SHERIFF's Law Lecture

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What do you see when you think of the law? What is your perception or image of the law? The privilege, the High Sheriff has conferred on me carries with it but few disadvantages, and it would discourteous and ungrateful to dwell on them. Perhaps I can be forgiven for mentioning one of them: the need to provide a title over nine months before the High Sheriff's Law Lecture was due for delivery. The danger of demanding such a human period between conception and delivery is that all who lack the gift of prophecy are liable to choose a title of such mind-numbing blandness and width in a feeble attempt to conceal the blindingly obvious that an inviting and enticing path in January is likely to become all too well-trodden an avenue, strewn with fading leaves of October.

But what luck I have had. To consider the image of the law at this very moment is of the utmost importance. This is, after all, a time when the debate as to whether power-grabbing, unelected judges have taken control over our lives has never seemed more contentious nor of such significance. Questions about our perception of the law, need to be asked for this reason. We, all of us as citizens need to identify what part the law plays in our lives, to position it in its right place and context, so as to form a view as to what part it ought to play in the way we are governed. We, as citizens, may no longer call ourselves, or want to call ourselves subjects, but however much we

want to exercise our own free will we must always recognise we are subject to some legal authority. And how can we recognise whether that legal authority is over-weening or too powerful unless we ask ourselves: what is our picture of the law?

So what do you see in your mind's eye when you think of the law? The answer will, of course, vary according to identity. The public, the politician, the journalist and the lawyer will each answer according to their experience; their view-point is, after all so very different. They will also, will they not, be seeking to make differing points? But one thing I am prepared to bet is that the image will be blurred. And it is my theme there persists a lack of clarity: it is worth asking why that should be so and what, if anything, could or should be done about it.

Let me acknowledge that most people of sense would think as little as possible about the law and our legal system. They certainly would not themselves wish to be involved in the wreckage of a road accident or a marriage. The law will only excite if it contains a compelling tale of the fear and misery of others, of the chase, of blood, of sex and retribution. We enjoy a fast-moving and gripping narrative. The law comes to the public in bite-sizes, with a story which has a beginning and an end, preferably an execution.

For that you need the criminal law, a focus of endless fascination because it tells stories, full of immediacy and zip and what better than a murder in the age of hanging. Even if what George Orwell described as the Elizabethan Age of capital murder in *Decline of the*

English Murder has long gone, we still relish the heady mixture of sex, passion and, poison. There is no shortage of modern accounts of Victorian, Edwardian and even Jazz-Age killing… new books about the Rattenbury murder was published in August, and about famous trials in Court One of the Old Bailey is by now, no doubt, a best seller. And make no mistake, to the public, if you are a judge, unless you are a criminal judge, preferably sitting at the Old Bailey, you are no judge at all. There are not many popular series about shipping legislation and I know of no films about capital gains tax.

The image of the law is doomed to be painted by black and white drama.

The message delivered to the public is not complex legal reality. However low the crime rate sinks, people will continue to prefer to believe that they are beset with a crime wave. However many more people we send to gaol, however pointless and expensive the process, people will continue to believe that prison works : the clang of the prison gates, as all-film-makers know, produces a clear and satisfying end, and as the understandable expectations of victims rise so does the length of prison sentences. Now we are promised even longer periods of detention, with the approach of a general election. The need for a comprehensive, comprehensible criminal justice in which all the constituent parts talk to each other has been conclusively demonstrated by Roger Graef in his Channel 4 series…but such a need is all too readily defeated by the media's skill in feeding the public's beliefs and prejudices. This produces a not so merry-go-round in which the media provide a narrative of legal events on the assumption of what people want to read, which itself provides a source of even greater prejudice, because most people only want to read material which conforms to their own belief, loyalties and bias.

But this year, the year of Sylvia's Law Lecture, you might think the public's image of the law, has radically changed. The drama has moved from the Old Bailey to the somewhat drab surroundings of Middlesex Town Hall in Parliament Square, the home of the Supreme Court. For a picture of a red golden haired defendant sobbing into her handkerchief as her barrister pleads her innocence in Court One of the Old Bailey, we have substituted, before our very eyes, the clipped tones of the President of the Supreme Court clipping the wings of our Prime Minister. Who would have thought, at the beginning of this year that the unsensational process of judicial review would match and surpass the theatre of a criminal trial? So striking and so significant were the events of 24 September 2019, the date of decision in *R (on the application of Miller v the Prime Minister* [2019 UKSC 41], that the image of the law may never be the same again.

I shall, I promise, explain what I mean but I hope I may be forgiven for what the Michelin Guide used to describe as un peu d'histoire, peppered with a little legal explanation. Will those who need neither excuse me?

Judicial review is not new even if its process has rarely, if ever, led to a bigger splash on our front pages. But it has been around, in its modern form since the 1970s and blossomed in the 80s, nearly forty years ago, due to cases which enlarged its application and to rules which eased its procedure. It is a procedure by which the courts can assess and determine the lawfulness of executive action by public bodies. The courts may condemn the actions of a public authority as unlawful on a number of grounds, for example that it is illegal, that

it has acted in a way that the law, usually set out in a written statute, does not permit, or if it is possible to identify the purpose of the written statute, that the action of the public body is contrary to that purpose or that the decision of the public authority is outside the range of reasonable conclusion. It is worth dwelling on that ground, the ground of irrationality and worth bearing it in mind when you think about the recent *Miller* case. Courts, in judicial review, are generally not concerned with the merits of an executive decision. In respect of many decisions a public authority has to make, whether it be, a health authority or a planning committee or an education authority, local or national government, there may be a number of answers to a problem or to a contentious issue. Often, the more difficult the problem the greater the range of possible solutions. You should bear in mind that a number of decisions may be reasonable even though they differ and may contradict each other.

Many of the most difficult questions are questions to which there is no right or correct answer or as Isaiah Berlin said, it is a myth that, there are *clear-cut and certain answers, even in an ideal world of wholly good and rational men*.

Courts will not or, should not condemn as unlawful a decision which falls within the range of reasonable decision-making, even if they disagree with it; but they will interfere by quashing a decision if it falls outside that range, if no reasonable decision maker could have reached the decision in question, in short irrational.. A health authority was required to decide to which patients a particular drug should be prescribed. It applied a policy which had the effect that no-one would have been given that medication. Its decision was found to be irrational. But even then the courts will not substitute

their own decision for that of the public body whose responsibility it was to make the decision. They will quash it, and tell the decision-maker to start again, if it wishes to do so; it is not for the courts to opt for an alternative.

There is another feature of judicial review that it is worthwhile having in mind, and that is the process by which the judges conduct the review of a decision made by a public body. There is no trial, no defendant in the dock, no jury; there are very rarely witnesses giving voice to oral evidence, very rarely cross-examination. There is written evidence and written argument supplemented by oral submissions, usually taking a day or two and then a written judgment from the court. Occasionally there may be a dispute in the evidence…two conflicting written statements that the court will try to resolve by identifying common ground on which it can base its decision as to the lawfulness of the public body's actions.

These procedures are miles away from the public's image of the law which is framed by the process and tone of criminal trial. Many arguments, good, bad indifferent, have been advanced as to why trials should not be televised, but it is rare to advance the suggestion that they are too ponderous and boring. As for judicial review, watching counsel arguing about written submissions and about written evidence the viewer has not seen is unlikely to be gripping and although, according to the Supreme Court website, millions *at some* stage, tuned in to the arguments in front of the Supreme Court it was perhaps the issue rather than the process which was the more enticing. Can you tell me the most frequently asked question by the

justices to the advocates in even as important a case as the first application for Judicial Review brought by Gina Miller? That was the case where she successfully established the unlawfulness of invoking art 50 to withdraw from the EU without Parliamentary legislation. The most frequently asked question was *which page are you reading from now Mr X?*

You should not then wonder at the reaction to the decision of the Supreme Court declaring the decision of the Prime Minister to prorogue Parliament unlawful and of no effect. Quite apart from the reasoning of the court, if the process is unclear it makes it all the more easy for the Prime Minister to ask Who Runs Britain? For Rees-Mogg,(he was the one who said that anyone who thought that proroguing Parliament for five weeks was unconstitutional should go back to school) it was a constitutional coup. The Daily Telegraph to summarise the objection to the ruling in its headline *Intervention by court in affairs of politics leaves us on a slippery slope?* And in the Sun *Sun Readers Slam Prorogue farce…Sun readers reacted with fury yesterday…many blasted the unelected judges….the elite have shafted us* again. And thus this indubitably momentous decision is reduced to the all too familiar and all too facile division between political issues, those that are a matter for the decision of politicians, Parliament, and government and questions of law to be determined by the judges in court.

Forgive me for describing the dispute as familiar but to those whose legal life has been dominated by the growth of judicial review, the conflict and the criticism is not new. Over the past forty years or so,

for the politician the image of the law is of judges intruding, with ever increasing frequency, into matters which are none of their business. The politician's assessment of judicial scrutiny of the legality of the decision of the executive is that it is interference; too often, so they say, judges have usurped the will of Parliament or, now that the distinction between the will of Parliament and the will of the people must be made, they have usurped the will of the people. It is true that in the most recent Miller case none repeated the Enemies of the People Headline from the Daily Mail. That headline prompted, you will recall much high-flown indignation and a protest from the retiring Lord Chief, at the absence of a rebuke from the then Lord Chancellor (the last but two I think, Lord Chancellors arrive and depart these days with somewhat greater punctuality and regularity than the trains for which one of them subsequently became responsible). Do you remember

David Blunkett in 2003: *I am personally fed up with a situation where Parliament debates issues and judges overturn them.* It is 22 years since Joshua Rosenberg wrote *Trial of Strength, the Battle between Ministers and Judges over who makes the law. Do judges have respect for Ministers? On the whole, no. Is there, he continued, any respect for the judiciary in government circles? Not as much as there should be?* To the late Lord Steyn, a former Law Lord the conflict itself provides protection for the citizen

It is when there is a state of perfect harmony between the judges and the executive that citizens need to worry. A state of tension between the judges and the executive, with each being watchful of encroachment into their province, is the best guarantee the subject can have against the abuse of power

Note the words he uses, *encroachment* and *province* based on the notion that there are two territories, one occupied by the judges, the other by the politicians. The metaphor gives rise to accusations of trespass and the complaint often expressed in terms which appear to be likening the judge to some tin-pot dictator … that the judiciary have been parking their tanks on *our lawn*.

The dispute about encroachment suggests that there is a boundary between the two provinces, the legal province within the jurisdiction of the judge and the political province a matter for politicians, Parliament and government. There has been no dispute but that there is such a boundary? But where is it? Where do you draw the line? Throughout the many years of judicial review of executive decision-making no map-maker has been able to draw the line with any clarity, or at least with the precision necessary to recognise a case of trespass. Said one famous judge Lord Goff in 1993, *although I am well aware of the existence of the boundary, I am never quite sure where to find it*. In 1996, Lord Bingham wrote *There has been difficulty and dispute on the frontier, not alleviated by doubt as to where the frontier should be.* It is no good saying that judges have gone too far unless you can identify the point at which they have gone far enough.

You might well think, if we are going to use the metaphor or image of a map, that it is of little use unless the cartographer, knows where to draw the frontier, where the boundary lines. The map is after all both dangerous and pointless if you cannot tell in advance which way to go to avoid trespass or falling off the edge of a cliff. You might as

you stumble about find signposts on the ground, but I must warn you, that in this field you will discover that they point in opposite directions.

Let me suggest the root of the problem, why it has never been solved and why, I foresee, it never will be and perhaps never should be resolved.. Lies and why I foresee it will never be resolved. The difficulty stems from the assumption that there is a distinction to be made between a political issue and a legal issue. Those who argue that the judges have intruded too far into the political arena and those who argue that they have confined themselves to legal issues, assume the very thing they have as yet not established namely that there is such a distinction.…they have embarked on a question-begging exercise.

The reason no-one can identify the boundary is that the distinction or dichotomy is of no use and is false. There is no point in drawing the distinction unless at the same time you can identify and set out the standard or test you will apply for determining whether a decision to be made is political or whether it is legal.

I can illustrate what I mean by reminding you of another important event this year, the former Supreme Court judge, Lord Sumption's Reith Lectures. Sumption, as so many who lack his skill in advocacy draws the distinction drawn between legal and political issues. A fundamental theme of his lectures was that a democratic deficit has emerged in the clash between plebiscite and parliamentary democracy. Public expectations, fuelled by the judicial regulation of

human choice through the medium of human rights have been a *powerful motor of legal development*. This development has tended to override the process of political decision-making to the extent that judges have begun to give legal effect to their personal values and opinions, claiming political power without political responsibility. Thus judges have started to say what the law ought to be rather than maintaining their correct role of identifying what the law is. They have begun to be regarded as bastions of liberalism against governments in thrall to illiberal public opinion.

Lord Sumption regards an attempt to make good the inability of democracy to solve a problem by seeking a legal solution as a significant danger to democracy itself. If, seeking compromise you fail to reach consensus, you should not seek to find a resolution in the courts.

He cites the US Judge Learned Hand in a quotation which I hope you will forgive me repeating *that a society so riven that the spirit of moderation is gone, no court can save, that a society where that spirit flourishes no court need save, that in a society which evades its responsibility by thrusting on the courts the nurture of that spirit, that spirit in the end will perish.*

Sumption uses the difference between a legal and political issue to challenge some of the judicial trends in human rights decisions, many of which he asserts are the proper subject of political not legal debate. As he put it in a lecture he gave in Kuala Lumpur in 2013 *The moment one moves beyond cases of real oppression and beyond the truly fundamental, one leaves the realm of consensus behind and enters that of legitimate political debate where issues ought to be resolved*

politically. It is a point to which he has long adhered..two years before, when still a QC he said that the *judicial resolution of inherently political issues is difficult to defend.*

This sounds terrific, like all good advocacy. And like all good advocacy there is an element ofsleight of hand about it. He deflects attention from the central difficulty: the absence of any reliable test to distinguish between a legal issue and a political issue, or what Sumption calls an inherently political issue. If the danger to democracy is seeking a solution from the courts you need some measure so as to know in advance into which category the issue of concern falls. If you cannot tell in advance then the very danger of which Sumption warns is likely to recur…of raising the expectations of those who believe that there is a legal solution to human problems and moral dilemma that are matters of personal or political choice and not for the courts. If no test has been identified, the public will continue to seek a legal solution where no political answer has been found. Sumption proffers no certain test for determining whether an issue is legal or political; he identifies cases which he says were clearly matters of political choice and others which plainly raise questions of legality but no standard or marker for distinguishing the two. But he did have the good fortune to be able so soon after his lectures to apply some of his learning to the Miller decision on 24th September.

On that date the Supreme Court allowed the Miller case and dismissed the Advocate General for Scotland's appeal. The court decided that there were legal limits to the exercise of the prerogative power to prorogue Parliament which has the effect of preventing Parliament from meeting, debating or passing legislation. To prevent Parliament

from carrying out those constitutional functions for the period of five weeks without any reason, let alone any reasonable justification, was unlawful.

It was predictable, inevitable rather, that the battle about the decision was fought on familiar ground. To those who condemned the decision it was an undemocratic intrusion into the legal arena and to those who approved of it it was no more than the imposition of legal restraint on the unlawful activity of the Prime Minister.

I know that many of you are anxious to hear another detailed analysis and commentary on the decision, The temptation is almost irresistible but my purpose is different, it is to demonstrate that this is yet another of many cases where useful analysis is not assisted by attaching the label political or legal…you can raise the temperature by speaking of over-mighty judges assuming political powers but, as you know, heat and steam tend to cloud the vision.

The Supreme Court itself sought to anticipate the criticism…*although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians or arise from a matter of political controversy has never been a significant reason for a court to refuse to considerate*.[31]

It is (the courts') responsibility to determine the legal limits of powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot

shirk that responsibility merely on the ground that the question raised is political in tone and content [39]

The court never identified what it meant by a political question but their words recall De Tocqueville's commentary on the power of lawyers in US: *there is scarcely any political question in the United States that does not ultimately resolve itself into a judicial question*. Sumption believes that DE Tocqueville would make the same point in relation to Britain today (Reith Lecture IV).

For a reliable picture of the law, after the Miller decision we need to rid ourselves of tired old pictures of trespass of tanks and of intrusion. I am far from saying that the Supreme Court case is not ripe for critical analysis. I cannot resist a few examples, none of which require drawing any distinction between political and legal issues.

The case starts with the somewhat defensive hope that it is a "one off". A perhaps unwise recognition that what they were deciding was what Sir Humphrey in Yes Minister would have called courageous. And though the court said no reason for the prorogation was given, the unkind cynic might remark that, in the light of the fact that the government disclosed three memorandums setting out and commenting on the proposal to prorogue for five weeks, this was a polite way of avoiding saying that the court rejected the government's reason. As I sought to explain earlier if the court had said that the Prime Minister had given a reason but it was not good enough it would have been criticised for substituting its owns views as to justification for those of the government. It would then have had to grapple with the decision of The Divisional Court (the decision of the LCJ, MR and President of the QB). That court had said that it it would be impossible to state whether the period of prorogation was excessive *because there was no legal measure by which the court*

could form a proper judgment on that matter. [56].The Supreme Court could not say that the reason given was insufficient unless it was going to say that the reasons offered were irrational. But the court avoided such a conclusion by saying that no reason at all was given. Nor did the court adopt the Scottish appeal court, the Inner House's approach which involved baldy rejecting the Primi Minister's stated reason for prorogation and ruling that his decision to prorogue was motivatedby the improper purpose of stymying Parliamentary scrutiny of the executive. The court did not, in the end comment on that decision, noting that it raises some different questions [54] which they never answered , contenting themselves only with dismissing the Scottish Law Officers' appeal. [71]. Perhaps they thought they had done enough to raise hackles.

Such an analysis avoids any need to make the impossible, impractical and useless distinction between political and legal territory; it does not require anyone to blunder about trying to find the boundary or the frontier. Because the reality is that questions for the courts are often both legal and political, particularly if they concern the way we are governed and the constitution. We are governed by a fuzzy combination of both the law, and Parliament with an executive answerable to both, and without a written constitution. As Sumption argued in the last of his Reith lectures, the absence of a written constitution prevents the judges from undermining Parliamentary sovereignty. A written constitution would require far more legal interpretation than the vague, ambiguous arrangements by which we are governed. Ambiguity ensures flexibility.

Lord Bingham said in 2005 *I do not accept the distinction between democratic institutions and the courts. It is of course true that the judges in this country are not elected and not answerable to Parliament…Parliament, the executive and the courts have different*

functions. But the function of independent judges to interpret and apply the law is universally recognised as a cardinal feature if the modern democratic state, a cornerstone of the rule of law itself.

You must be as fed up as the rest of us when one of our elected representatives announces that they are going to be clear, or even perfectly clear. I am not, I am content with not light but rather darkness visible or as Dr Bowdler called it a perspicuous gloom. But that is nothing to be gloomy about. We should be comforted by an image of the law which pictures the often inadequate attempts of the courts and judges, as the Whit-Sunday Collect prays, to have a *right judgment in all things*. It may be unclear who should be deciding what, or who is governing us, but how could it or should it be otherwise when we are dealing with the *crooked timber of mankind*.